



ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OAR-2013-0491; FRL9914-78-OAR]

California State Motor Vehicle Pollution Control Standards; Heavy-Duty Tractor-Trailer Greenhouse Gas Regulations; Notice of Decision

AGENCY: ENVIRONMENTAL PROTECTION AGENCY

ACTION: Notice of Decision.

SUMMARY: The Environmental Protection Agency (EPA) is granting the California Air Resources Board's (CARB) request for a waiver of Clean Air Act preemption to enforce provisions of its Heavy-Duty Tractor-Trailer Greenhouse Gas Regulations ("HD GHG Regulations") applicable to new 2011 through 2013 model year (MY) Class 8 tractors equipped with integrated sleeper berths (sleeper-cab tractors) and to new 2011 and subsequent MY dry-van and refrigerated-van trailers that are pulled by such tractors on California highways. This decision is issued under the authority of the Clean Air Act ("CAA" or "the Act").

DATES: Petitions for review must be filed by **[INSERT DATE SIXTY DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: EPA has established a docket for this action under Docket ID EPA-HQ-OAR-2013-0491. All documents relied upon in making this decision, including those submitted to EPA by CARB, are contained in the public docket. Publicly available docket materials are available either electronically through www.regulations.gov or in hard copy at the Air and Radiation Docket in the EPA Headquarters Library, EPA West Building, Room 3334, 1301 Constitution Avenue, NW, Washington, DC. The Public Reading Room is open to the public on all federal government working days from 8:30 a.m. to

4:30 p.m.; generally, it is open Monday through Friday, excluding holidays. The telephone number for the Reading Room is (202) 566-1744. The Air and Radiation Docket and Information Center's website is <http://www.epa.gov/oar/docket.html>. The email address for the Air and Radiation Docket is: a-and-r-docket@epa.gov, the telephone number is (202) 566-1742, and the fax number is (202) 566-9744. An electronic version of the public docket is available through the federal government's electronic public docket and comment system at <http://www.regulations.gov>. After opening the www.regulations.gov website, enter EPA-HQ-OAR-2013-0491 in the "Enter Keyword or ID" fill-in box to view documents in the record. Although a part of the official docket, the public docket does not include Confidential Business Information ("CBI") or other information whose disclosure is restricted by statute.

EPA's Office of Transportation and Air Quality ("OTAQ") maintains a webpage that contains general information on its review of California waiver and authorization requests. Included on that page are links to prior waiver *Federal Register* notices, some of which are cited in today's notice; the page can be accessed at <http://www.epa.gov/otaq/cafr.htm>.

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SUPPLEMENTARY INFORMATION:

I. Background

By letter dated June 20, 2013, CARB requested that EPA grant a waiver of

preemption pursuant to section 209(b) of the CAA for the California HD GHG Regulations applicable to new 2011 through 2013 model year (MY) Class 8 tractors equipped with integrated sleeper berths (sleeper-cab tractors) and to new 2011 and subsequent MY dry-van and refrigerated-van trailers that are pulled by such tractors on California highways. The HD GHG Regulations are set forth at title 17, California Code of Regulations (CCR) sections 95300 through 95312.¹ The HD GHG Regulations apply to new and in-use 53-foot or longer trailers and the new and in-use tractors that pull them.² However, California expressly limited the scope of its waiver request to just new MY2011 - MY2013 tractors and MY2011 and later trailers, as described above, “that together are considered to operate as an integrated vehicle.”³

CARB did not include the full suite of HD GHG Regulations in its waiver request, nor did it include emergency, temporary amendments to the HD GHG Regulations that CARB adopted in 2012.⁴

CARB’s June 20, 2013 submission provides analysis and evidence to support its finding that the HD GHG Regulations satisfy the CAA section 209(b) criteria and that a waiver of preemption should be granted.

The request notes that CARB promulgated the HD GHG Regulations in response to the California Global Warming Solutions Act of 2006 (AB 32).⁵ That legislation directs CARB to implement “discrete early action GHG emission reduction measures” to

¹ Please note that, as used herein, the term “HD GHG Regulations” encompasses all of 17 CCR 95300 through 95312, thus including provisions whose scope may apply to products beyond California’s waiver request. EPA will clarify when statements herein apply exclusively to provisions that are included in the waiver request, and not also to the HD GHG Regulations more generally.

² 17 CCR §§ 95301(a)(1) and 95302(a)(28).

³ California Waiver Request Support Document, June 20, 2013, EPA-HQ-OAR-2013-0491-0003, at 2. California’s waiver request does not include California’s more recent action to harmonize its HD GHG Regulations with EPA’s HD GHG rule beginning MY 2014.

⁴ Id. at 8.

⁵ California Global Warming Solutions Act of 2006, Assembly Bill 32, Stats. 2006, Chapter 488.

achieve cost-effective reductions in GHG emissions. The resulting HD GHG Regulations are designed to reduce GHG emissions by, *inter alia*, requiring certain tractors and semitrailers on California highways to employ aerodynamic technologies and low-rolling-resistance tires. CARB determined that aerodynamic and other efficiency upgrades would yield the greatest GHG benefits when installed on vehicles that operate frequently at highway speeds. The HD GHG Regulations therefore exempt certain types of tractors and trailers that CARB deemed to be less likely to travel at highway speeds.⁶

For vehicles that are not exempted, the HD GHG Regulations incorporate elements of EPA's SmartWay® Program,⁷ in effect mandating use of technologies that fleets may adopt voluntarily to achieve SmartWay designation.⁸ Specifically, the HD GHG Regulations subject to this waiver request require new 2011 and subsequent MY sleeper-cab tractors⁹ that haul 53-foot or longer box-type trailers on California highways to be SmartWay certified¹⁰ and to use SmartWay verified tires beginning January 1, 2010.¹¹ Likewise, new 2011 and subsequent MY dry-van and refrigerated-van trailers are also required to be SmartWay certified (or equipped with specified SmartWay Verified Technologies) beginning January 1, 2010.¹² The HD GHG Regulations apply to tractors

⁶ 17 CCR § 95301(b),(c). Exemptions include local-haul and short-haul tractors and trailers, drayage tractors and trailers, storage trailers, empty trailers, drop-frame trailers, chassis trailers, curtain-side trailers, livestock trailers, refuse trailers, and box-type trailers that are less than 53 feet in length.

⁷ EPA's SmartWay Technology Program is a voluntary testing, verification, and designation program to help freight companies identify equipment, technologies and strategies that save fuel and lower emissions. See <http://epa.gov/smartway/about/index.htm>

⁸ These criteria for tractors include (i) a 2007 or subsequent MY federally certified engine, (ii) an integrated sleeper-cab high roof fairing, (iii) tractor-mounted side-fairing gap reducers, (iv) tractor fuel-tank side fairings, (v) aerodynamic bumpers and mirrors, (vi) low-rolling-resistance tires meeting SmartWay specifications, and (vii) optional systems for reducing extended engine idling. California Waiver Request Support Document, June 20, 2013, EPA-HQ-OAR-2013-0491-0003, at 9.

⁹ As noted above, this waiver request is applicable only to MY 2011-2013 sleeper-cab tractors.

¹⁰ California's term "SmartWay certified" is synonymous with EPA's term "SmartWay designated" herein.

¹¹ 17 CCR § 95303(a).

¹² 17 CCR § 95303(b). EPA SmartWay criteria for dry-van trailers include five possible configurations, all requiring low-rolling-resistance tires and aerodynamic improvements (e.g., trailer side skirt fairings, trailer

and trailers when driven on a highway within California whether or not the equipment is registered in California.¹³

CARB projects that the HD GHG Regulations overall will reduce GHG emissions in California by 0.7 million metric tons of carbon-dioxide equivalent emissions by 2020.¹⁴ CARB also projects that the HD GHG Regulations will reduce nitrogen oxide (NO_x) emissions in California by 3.1 tons per day in 2014, thereby helping California meet national ambient air quality standards for particulate matter and ozone.¹⁵

CARB states that it formally adopted the HD GHG Regulations on October 23, 2009, and the HD GHG Regulations became operative under state law on January 1, 2010.¹⁶ Amendments to provide compliance flexibility (“the 2010 Amendments”), including limited five-day exemptions and an alternative compliance schedule, were adopted by CARB on October 26, 2011, and became operative on January 11, 2012.¹⁷

II. Principles Governing this Review

A. Scope of Review

Section 209(a) of the CAA provides:

“No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part. No State shall require certification, inspection or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment.”¹⁸

front-mounted gap reducer fairings, and trailer rear fairings). California Waiver Request Support Document, June 20, 2013, EPA-HQ-OAR-2013-0491-0003, at 11.

¹³ 17 CCR §§ 95301(a), 95302(a)(37), 95303.

¹⁴ California Waiver Request Support Document, June 20, 2013, EPA-HQ-OAR-2013-0491-0003, at 1.

¹⁵ California Waiver Request Support Document, June 20, 2013, EPA-HQ-OAR-2013-0491-0003, at 1. The NO_x reduction benefit is projected to fall to a 1 ton per day reduction in NO_x emissions by 2020. *Id.*

¹⁶ California Waiver Request Support Document, June 20, 2013, EPA-HQ-OAR-2013-0491-0003, at 4.

¹⁷ *Id.* at 7.

¹⁸ CAA § 209(a). 42 U.S.C. § 7543(a).

Section 209(b)(1) of the Act requires the Administrator, after an opportunity for public hearing, to waive application of the prohibitions of section 209(a) for any state that has adopted standards (other than crankcase emission standards) for the control of emissions from new motor vehicles or new motor vehicle engines prior to March 30, 1966, if the state determines that its state standards will be, in the aggregate, at least as protective of public health and welfare as applicable federal standards.¹⁹ However, no such waiver shall be granted if the Administrator finds that: (A) the protectiveness determination of the state is arbitrary and capricious; (B) the state does not need such state standards to meet compelling and extraordinary conditions; or (C) such state standards and accompanying enforcement procedures are not consistent with section 202(a) of the Act.²⁰

Key principles governing this review are that EPA should limit its inquiry to the specific findings identified in section 209(b)(1) of the Clean Air Act, and that EPA will give substantial deference to the policy judgments California has made in adopting its regulations. In previous waiver decisions, EPA has stated that Congress intended the Agency's review of California's decision-making to be narrow. EPA has rejected arguments that are not specified in the statute as grounds for denying a waiver:

“The law makes it clear that the waiver requests cannot be denied unless the specific findings designated in the statute can properly be made. The issue of whether a proposed California requirement is likely to result in only marginal improvement in California air quality not commensurate with its costs or is otherwise an arguably unwise exercise of regulatory power is not legally pertinent to my decision under section 209, so long as the California requirement is consistent with section 202(a) and is more

¹⁹ CAA § 209(b)(1). 42 U.S.C. § 7543(b)(1). California is the only state that meets section 209(b)(1)'s requirement for obtaining a waiver. *See* S. Rep. No. 90-403 at 632 (1967).

²⁰ CAA § 209(b)(1). 42 U.S.C. § 7543(b)(1).

stringent than applicable Federal requirements in the sense that it may result in some further reduction in air pollution in California.”²¹

This principle of narrow EPA review has been upheld by the U.S. Court of Appeals for the District of Columbia Circuit.²² Thus, EPA’s consideration of all the evidence submitted concerning a waiver decision is circumscribed by its relevance to those questions that may be considered under section 209(b)(1).

B. Burden and Standard of Proof

As the U.S. Court of Appeals for the D.C. Circuit has made clear in *MEMA I*, opponents of a waiver request by California bear the burden of showing that the statutory criteria for a denial of the request have been met:

“[T]he language of the statute and its legislative history indicate that California’s regulations, and California’s determinations that they must comply with the statute, when presented to the Administrator are presumed to satisfy the waiver requirements and that the burden of proving otherwise is on whoever attacks them. California must present its regulations and findings at the hearing and thereafter the parties opposing the waiver request bear the burden of persuading the Administrator that the waiver request should be denied.”²³

The Administrator’s burden, on the other hand, is to make a reasonable evaluation of the information in the record in coming to the waiver decision. As the court in *MEMA I* stated: “here, too, if the Administrator ignores evidence demonstrating that the waiver should not be granted, or if he seeks to overcome that evidence with unsupported assumptions of his own, he runs the risk of having his waiver decision set aside as

²¹ “Waiver of Application of Clean Air Act to California State Standards,” 36 FR 17458 (Aug. 31, 1971). Note that the more stringent standard expressed here, in 1971, was superseded by the 1977 amendments to section 209, which established that California must determine that its standards are, in the aggregate, at least as protective of public health and welfare as applicable federal standards.

²² See, e.g., *Motor and Equip. Mfrs Assoc. v. EPA*, 627 F.2d 1095 (D.C. Cir. 1979) (“*MEMA I*”).

²³ *MEMA I*, note 19, at 1121.

‘arbitrary and capricious.’”²⁴ Therefore, the Administrator’s burden is to act “reasonably.”²⁵

With regard to the standard of proof, the court in *MEMA I* explained that the Administrator’s role in a section 209 proceeding is to:

“[...]consider all evidence that passes the threshold test of materiality and ... thereafter assess such material evidence against a standard of proof to determine whether the parties favoring a denial of the waiver have shown that the factual circumstances exist in which Congress intended a denial of the waiver.”²⁶

In that decision, the court considered the standards of proof under section 209 for the two findings related to granting a waiver for an “accompanying enforcement procedure.”

Those findings involve: (1) whether the enforcement procedures impact California’s prior protectiveness determination for the associated standards, and (2) whether the procedures are consistent with section 202(a). The principles set forth by the court, however, are similarly applicable to an EPA review of a request for a waiver of preemption for a standard. The court instructed that “the standard of proof must take account of the nature of the risk of error involved in any given decision, and it therefore varies with the finding involved. We need not decide how this standard operates in every waiver decision.”²⁷

With regard to the protectiveness finding, the court upheld the Administrator’s position that, to deny a waiver, there must be “clear and compelling evidence” to show that proposed enforcement procedures undermine the protectiveness of California’s standards.²⁸ The court noted that this standard of proof also accords with the

²⁴ *Id.* at 1126.

²⁵ *Id.* at 1126.

²⁶ *Id.* at 1122.

²⁷ *Id.*

²⁸ *Id.*

congressional intent to provide California with the broadest possible discretion in setting regulations it finds protective of the public health and welfare.²⁹

With respect to the consistency finding, the court did not articulate a standard of proof applicable to all proceedings, but found that the opponents of the waiver were unable to meet their burden of proof even if the standard were a mere preponderance of the evidence. Although *MEMA I* did not explicitly consider the standards of proof under section 209 concerning a waiver request for “standards,” as compared to a waiver request for accompanying enforcement procedures, there is nothing in the opinion to suggest that the court’s analysis would not apply with equal force to such determinations. EPA’s past waiver decisions have consistently made clear that: “[E]ven in the two areas concededly reserved for Federal judgment by this legislation—the existence of ‘compelling and extraordinary’ conditions and whether the standards are technologically feasible—Congress intended that the standards of EPA review of the State decision to be a narrow one.”³⁰

C. Deference to California

In previous waiver decisions, EPA has recognized that the intent of Congress in creating a limited review based on specifically listed criteria was to ensure that the federal government did not second-guess state policy choices. As the Agency explained in one prior waiver decision:

“It is worth noting ... I would feel constrained to approve a California approach to the problem which I might also feel unable to adopt at the federal level in my own capacity as a regulator.... Since a balancing of [] risks and costs against the potential benefits from reduced emissions is a central policy decision for any regulatory agency under the statutory

²⁹ *Id.*

³⁰ *See, e.g.*, “California State Motor Vehicle Pollution Control Standards; Waiver of Federal Preemption,” 40 FR 23102 (May 28, 1975), at 23103.

scheme outlined above, I believe I am required to give very substantial deference to California's judgments on this score."³¹

Similarly, EPA has stated that the text, structure, and history of the California waiver provision clearly indicate both a congressional intent and appropriate EPA practice of leaving the decision on "ambiguous and controversial matters of public policy" to California's judgment.³² This interpretation is supported by relevant discussion in the House Committee Report for the 1977 amendments to the CAA. Congress had the opportunity through the 1977 amendments to restrict the preexisting waiver provision, but elected instead to expand California's flexibility to adopt a complete program of motor vehicle emission controls. The report explains that the amendment is intended to ratify and strengthen the preexisting California waiver provision and to affirm the underlying intent of that provision, that is, to afford California the broadest possible discretion in selecting the best means to protect the health of its citizens and the public welfare.³³

D. EPA's Administrative Process in Consideration of California's Request

On August 21, 2013, EPA published a notice of opportunity for public hearing and comment on California's waiver request. EPA scheduled a public hearing concerning CARB's request for September 6, 2013, and asked for written comments to be submitted by October 18, 2013.³⁴ EPA's notice of CARB's request invited public comment on the following issues:

"Whether (a) California's determination that its motor vehicle emission standards are, in the aggregate, at least as protective of public health and welfare as applicable federal standards is arbitrary and capricious, (b)

³¹ 40 FR 23102, 23103-04 (May 28, 1975).

³² 40 FR 23102, 23104 (May 28, 1975); 58 FR 4166 (January 13, 1993).

³³ *MEMA I*, 627 F.2d at 1110 (citing H.R. Rep. No. 294, 95th Cong., 1st Sess. 301-02 (1977)).

³⁴ 78 FR 51724 (August 21, 2013).

California needs such standards to meet compelling and extraordinary conditions, and (c) California’s standards and accompanying enforcement procedures are consistent with section 202(a) of the Clean Air Act.”³⁵

EPA received no requests for a public hearing, so EPA did not hold a hearing. In response to the request for comments, EPA received comments from the California Construction Trucking Association (“CCTA”),³⁶ the Owner-Operated Independent Drivers Association, Inc. (OIDA),³⁷ the California Trucking Association (CTA),³⁸ and American Trucking Associations, Inc. (ATA).³⁹ EPA also received an additional submission from CARB.⁴⁰

III. Discussion

As discussed above, California’s HD GHG Regulations apply to trailers as well as to tractors. The inclusion of trailers in the HD GHG Regulations led to comments raising the question of whether California’s HD GHG trailer regulations are “standards relating to the control of emissions from new motor vehicles or new motor vehicle engines” and thus, subject to CAA preemption under section 209(a) and EPA waiver review under section 209(b)(1). As a result, before proceeding to a discussion on the merits of the waiver request, the Agency will first address the threshold question of whether the trailer regulations are indeed preempted and subject to EPA waiver review.

A. Whether Regulation of GHG Emissions Associated with Trailer Use Relates to the Control of Emissions from New Motor Vehicles

Section 209(a) of the CAA only applies to states’ efforts to “adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new

³⁵ 78 FR 51725 (August 21, 2013).

³⁶ CCTA comments are at EPA-HQ-OAR-2013-0491-0051.

³⁷ OOIDA comments are at EPA-HQ-OAR-2013-0491-0053.

³⁸ CTA comments are at EPA-HQ-OAR-2013-0491-0052.

³⁹ ATA comments are at EPA-HQ-OAR-2013-0491-0050.

⁴⁰ CARB supplemental comments are at EPA-HQ-OAR-2013-0491-0054.

motor vehicle engines.”⁴¹ Thus, if a California regulation (in this case the regulation of greenhouse gas emissions associated with trailers) does not relate to the control of emissions from new motor vehicles or new motor vehicle engines, there would be no preemption under section 209(a), in which case no waiver is necessary under section 209(b) for California to enforce its regulation. Conversely, a waiver would be necessary and a waiver review appropriate for any California regulation that sets forth any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines. Therefore, as a threshold issue, the Agency first examines whether the HD GHG Regulations, as applied to the reduction of emissions associated with trailer use, relate to the control of emissions from new motor vehicles or new motor vehicle engines, as defined and applied under the CAA.

EPA received comments from CCTA and OOIDA arguing that trailers are not by themselves “motor vehicles” and do not by themselves produce emissions, and therefore the HD GHG Regulations for trailers are not related to the control of emissions from new motor vehicles.⁴² If this argument were correct, then California would not need a waiver of preemption under section 209(b), as discussed above. We note that both CCTA and OOIDA make this point as part of arguments that assume that CARB’s authority to regulate comes from CAA section 209, and that CARB has no authority to regulate trailers apart from the CAA. However, CARB’s authority to regulate comes from California state law.⁴³ As noted in *MEMA I*, the U.S. Court of Appeals for the District of

⁴¹ 42 U.S.C. § 7543(a).

⁴² CCTA, at 2; OOIDA, at 4.

⁴³ See Response to Comments Submitted by Parties Opposing California’s Request for Waiver for California’s Tractor-Trailer Greenhouse Gas Regulation Pursuant to Clean Air Act Section 209(b), December 6, 2013, EPA-HQ-OAR-2013-0491-0054 (“CARB’s Supplemental Comment”), at 2 (“CARB’s authority to regulate new 53-foot and longer box-type trailers pulled by tractors is derived from *state law*, primarily, the California Global Warming Solutions Act of 2006...”)

Columbia Circuit, in reviewing the legislative history of section 209, noted that California had regulated motor vehicle pollution well before any federal emission standards were promulgated.⁴⁴ Section 209 only relates to the potential Clean Air Act preemption of California’s laws on the issue. EPA did not receive comment indicating why a regulation that is not preempted by section 209(a) should be disallowed by EPA. Certainly, for the purposes of this proceeding, if a state regulation is not prohibited under section 209(a), then a waiver of preemption is unnecessary under section 209(b).

CARB’s waiver request did not address the statutory interpretation of the CAA definition of “motor vehicle,” or specifically, whether that would include trailers. CARB nevertheless requested a waiver for the HD GHG Regulations (including the trailer provisions), stating that its request “is consistent with EPA’s statements that trailers affect the aerodynamic drag, rolling resistance, and overall weight of combination tractor-trailers.”⁴⁵ In addition, CARB notes that EPA had found that addressing GHG emissions from heavy-duty trucks requires a focus on the entire vehicle, and that trailers impact the carbon dioxide emissions from combination tractors.⁴⁶

The CAA defines “motor vehicle” as “any self-propelled vehicle designed for transporting persons or property on a street or highway.”⁴⁷ The commenters note that a trailer by itself is not “self-propelled.” They claim that as a result, a trailer does not constitute a “motor vehicle” under the Act. EPA disagrees. Another evident way to view the issue is that the heavy-duty vehicles subject to this waiver discussion are comprised

⁴⁴ *MEMA I* at 1110-1111 (“The history of congressional consideration of the California waiver provision, from its original enactment up through 1977, indicates that Congress intended the State to *continue and expand* its pioneering efforts at adopting and enforcing motor vehicle emission standards...”)(Emphasis added).

⁴⁵ California Waiver Request Support Document, June 20, 2013, EPA-HQ-OAR-2013-0491-0003, at 2 n.4.

⁴⁶ CARB’s Supplemental Comment, at 3-4, *citing* 75 FR 74152, 74159-160, 74346 (November 30, 2010) and 76 FR 57106, 57362 (September 15, 2011).

⁴⁷ 42 U.S.C. § 7550(2).

of two major components: the tractor and the trailer. The vehicle consists of these two detachable parts. The trailer's sole purpose is to serve as the cargo-hauling part of the vehicle. Without the tractor, the trailer cannot transport property; however, the tractor is also incomplete without the trailer. The motor vehicle needs both parts to accomplish its fully intended use. Connected together, a tractor and trailer constitute "a self-propelled vehicle designed for transporting persons or property on a street or highway," and thus meet the definition of "motor vehicle" under the Act.

This analysis is consistent with definitions in the federal regulations issued under the Act at 40 CFR 86.1803.01, where a heavy-duty vehicle "that has the primary load carrying device or container attached" is referred to as a "[c]omplete heavy-duty vehicle," while a heavy-duty vehicle or truck "which does not have the primary load carrying device or container attached" is referred to as an "[i]ncomplete heavy-duty vehicle" or "[i]ncomplete truck."⁴⁸ The trailers covered by California's HD GHG Regulations here are properly considered "the primary load carrying device or container" for the heavy-duty vehicles to which they become attached for use. Therefore, such trailers are implicitly part of a "complete heavy-duty vehicle," and thus part of a "motor vehicle."

Moreover, it is important to remember that the preemption language in section 209 does not apply to "motor vehicles," but to "standards relating to the control of emissions from new motor vehicles or new motor vehicle engines." As EPA discussed in

⁴⁸40 CFR 86.1803.01 "*Complete heavy-duty vehicle* means any Otto-cycle heavy-duty vehicle of 14,000 pounds Gross Vehicle Weight Rating or less that has the primary load carrying device or container attached at the time the vehicle leaves the control of the manufacturer of the engine." ... "*Incomplete heavy-duty vehicle* means any heavy-duty vehicle which does not have the primary load carrying device or container attached." ... "*Incomplete truck* means any truck which does not have the primary load carrying device or container attached."

its regulation of greenhouse gas emissions from heavy-duty engines, improvement of trailer aerodynamic properties will result in GHG emission reductions from the engine of the vehicle. Likewise, the efficiency of the trailer's tires affects GHG emission levels.⁴⁹ It is therefore logical to treat emission-related regulations directed at trailers pulled by tractors as regulations related to emissions of motor vehicles under the CAA. In the same way, EPA has applied its regulations to other equipment that is known to be generally part of a motor vehicle and to affect the emissions of the motor vehicle, but is not part of the engine system or powertrain itself. For example, emissions testing provisions under the federal rules controlling GHG emissions from heavy-duty vehicles and engines consider the test vehicle's tires in determining the vehicle's emissions test results. Light-duty vehicle roof racks and side mirrors (which affect vehicle aerodynamics, and hence GHG emissions) are additional examples from the EPA light-duty vehicle rules. Similarly, under 40 CFR 86.1832-01, optional equipment that exceeds a certain minimum weight is counted in the curb weight for a motor vehicle if it is expected to be attached to at least a certain minimum percentage of the car line. Like trailers, these parts of a motor vehicle do not generally produce emissions by themselves, but they are nevertheless considered in determining emissions related to motor vehicles under the CAA.

In addition, we note that the California program regulates emissions associated with trailers when the trailer is operated as part of the vehicle. The reason the trailers are regulated is because of their effect on the vehicle's emissions. CCTA, in its comments, does not dispute that a trailer affects the GHG emissions of the tractor pulling the trailer or that the HD GHG Regulations as to trailers are intended to create emissions reductions

⁴⁹ See 75 FR 74152, 74347-49 (Nov. 30, 2010); 76 FR 57106, 57362 (Sept. 15, 2011). Weight reduction from trailers affords another opportunity for GHG reductions. *Id.*

from new motor vehicles that include those trailers.⁵⁰ In summary, California's HD GHG Regulations clearly relate to the control of emissions from new motor vehicles and are thus subject to the CAA preemption and waiver requirements under section 209 of the Act.

Moreover, as noted above, even under the commenters' argument that emission standards applicable to trailers are not standards related to emissions from motor vehicles, the effect of that argument would be that California regulations affecting trailers would not be preempted under section 209(a) of the Act, and thus would not need a waiver under section 209(b) of the Act to be enforced.

B. California's Protectiveness Determination

Section 209(b)(1)(A) of the Act sets forth the first of the three criteria governing a waiver request – whether California was arbitrary and capricious in its determination that its state standards will be, in the aggregate, at least as protective of public health and welfare as applicable federal standards. Section 209(b)(1)(A) of the CAA requires EPA to deny a waiver if the Administrator finds that California's protectiveness determination was arbitrary and capricious. However, a finding that California's determination was arbitrary and capricious must be based upon clear and convincing evidence that California's finding was unreasonable.⁵¹

CARB did make a protectiveness determination in adopting the HD GHG Regulations, and found that the HD GHG Regulations would not cause California motor vehicle emissions standards, in the aggregate, to be less protective of the public health

⁵⁰ CCTA, at 2.

⁵¹ *MEMA I*, 627 F.2d at 1122, 1124 (“Once California has come forward with a finding that the procedures it seeks to adopt will not undermine the protectiveness of its standards, parties opposing the waiver request must show that this finding is unreasonable.”); *see also* 78 FR 2112, at 2121 (Jan. 9, 2013).

and welfare than applicable federal standards.⁵² CARB noted that EPA has not issued regulations to control GHG emissions from medium and heavy-duty on-road vehicles for MYs 2011 through 2013, nor has EPA issued regulations to control GHG emissions relating to trailer usage. Thus, CARB concluded that California's 2011 through 2013 MY standards for sleeper-cab tractors and California's standards for MY 2011 and subsequent trailers are clearly, in the aggregate, at least as protective of the public health and welfare as applicable federal standards.⁵³

Under CAA section 209(b)(2), "[i]f each State standard is at least as stringent as the comparable applicable Federal standard, such State standard shall be deemed to be at least as protective of health and welfare as such Federal standards for purposes of [209(b)(1)]."⁵⁴ Where, as here, there are no federal standards directly comparable to the specific California standards under review,⁵⁵ the analysis then occurs against the backdrop of previous waivers, which have determined that the California program overall was at least as protective as the federal program.⁵⁶ Consistent with this precedent, we cannot find that the HD GHG Regulations for which California is now requesting a waiver diminish the protectiveness of the overall California program.

EPA received no comments or evidence suggesting that CARB's protectiveness determination, under EPA's traditional analysis, is arbitrary and capricious. In particular, no commenter disputes that California standards, whether looking at the particular California standards being analyzed in this proceeding or the entire suite of California

⁵² California Waiver Request Support Document, June 20, 2013, EPA-HQ-OAR-2013-0491-0003, at 16, citing Board Resolutions 08-44 and 10-46.

⁵³ *Id.*

⁵⁴ CAA § 209(b)(2); *see also* 78 FR 2112, at 2121-22 (Jan. 9, 2013).

⁵⁵ As mentioned, while comparable federal standards for tractors will apply beginning MY 2014, there are no comparable standards for MYs 2011-2013 and no comparable federal standards for trailers.

⁵⁶ 78 FR 2112, at 2122 n. 52 (Jan. 9, 2013); *see also* 71 FR 78190 (December 21, 2006).

standards applicable to heavy-duty motor vehicles and engines, are at least as stringent, in the aggregate, as applicable federal standards.

CTA did note that EPA provided policy reasons for not regulating trailers in the first phase of EPA's Heavy-Duty National Program.⁵⁷ However, EPA's policy discussion cited by CTA does not indicate regulation of trailers was not protective of public health. As noted above, EPA acknowledged that regulation of trailers could have an effect on emissions.

CTA commented that CARB's protectiveness conclusion was not rationally based on any empirical evidence demonstrating benefits from the HD GHG Regulations.⁵⁸ CTA argues that the actual emission reduction benefits of the HD GHG Regulations are much lower than CARB claimed, although CTA acknowledges that the HD GHG Regulations do provide at least some emissions reduction benefit in the aggregate.⁵⁹

However, this comment does not take into account that the protectiveness criterion does not require EPA to determine whether California's projections of emission reductions are correct in all of its aspects, but rather whether CARB's protectiveness determination is arbitrary and capricious. EPA need not confirm the precise accuracy of California's projections of emission benefits to find that its protectiveness determination is not arbitrary or capricious. This has not been EPA's practice in prior waiver decisions. As previously explained, the text, structure, and history of section 209(b)(1) clearly indicate both a congressional intent and appropriate EPA practice of leaving the decision

⁵⁷ CTA, at 3; "Greenhouse Gas Emissions Standards and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles," 76 FR 57106 (September 15, 2011) ("Heavy-Duty National Program").

⁵⁸ CTA, at 3-4.

⁵⁹ CTA, at 4 and at Attachment B.

on “ambiguous and controversial matters of public policy” to California’s judgment.⁶⁰ Thus, unless EPA finds California’s protectiveness determination to be arbitrary and capricious, the state’s determination that the HD GHG regulations provide an emissions reduction benefit that is at least equivalent to federal standards is sufficient.

Indeed, California standards are most clearly “at least as protective” when they are compared to the absence of federal emission standards.⁶¹ In the absence of EPA standards there is a clear rational basis for CARB’s determination that its standards will be at least as protective of human health and welfare as applicable federal standards.

Because the commenters have not presented evidence to show that CARB’s protectiveness determination is arbitrary and capricious, EPA cannot find that California’s protectiveness determination is arbitrary and capricious.

C. Whether the Standards are Necessary to Meet Compelling and Extraordinary Conditions

Section 209(b)(1)(B) instructs that EPA cannot grant a waiver if the Agency finds that California “does not need such California standards to meet compelling and extraordinary conditions.” EPA’s inquiry under this second criterion has traditionally been to determine whether California needs its own mobile source pollution program (i.e. set of standards) for the relevant class or category of vehicles or engines to meet compelling and extraordinary conditions, and not whether the specific standards that are the subject of the waiver request are necessary to meet such conditions.⁶² In recent waiver actions, EPA again examined the language of section 209(b)(1)(B) and reiterated this

⁶⁰ 40 FR 23102, 23104 (May 28, 1975); 58 FR 4166 (January 13, 1993).

⁶¹ 74 FR 32744, 32755 (July 8, 2009).

⁶² See California State Motor Vehicle Pollution Control Standards; Notice of Decision Granting a Waiver of Clean Air Act Preemption for California’s 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles,” 74 FR 32744 (July 8, 2009), at 32761; see also “California State Motor Vehicle Pollution Control Standards; Waiver of Federal Preemption Notice of Decision,” 49 FR 18887 (May 3, 1984), at 18889-18890.

longstanding traditional interpretation as the better approach for analyzing the need for “such State standards” to meet “compelling and extraordinary conditions.”⁶³

CARB determined in Resolutions 08-44 and 10-46 that California continues to need its own motor vehicle program to meet serious ongoing air pollution problems.⁶⁴ CARB asserted that “[t]he geographical and climatic conditions and the tremendous growth in vehicle population and use that moved Congress to authorize California to establish vehicle standards in 1967 still exist today ... and therefore there can be no doubt of the continuing existence of compelling and extraordinary conditions justifying California’s need for its own motor vehicle emissions control program.”⁶⁵ Specifically, CARB’s Board noted “The proposed regulation is estimated to result in statewide reductions of oxides of nitrogen emissions of approximately 4.3 tons per day in 2014 and 1.4 tons per day in 2020. These reductions will help with progress toward attainment of National and State Ambient Air Quality Standards for particulate matter and ozone.”⁶⁶

There has been no evidence submitted to indicate that California’s compelling and extraordinary conditions do not continue to exist. California, particularly the South Coast and San Joaquin Valley air basins, continues to experience some of the worst air quality in the nation and many areas in California continue to be in non-attainment with national ambient air quality standards for fine particulate matter and ozone.⁶⁷ As California has

⁶³ See 78 FR 2112, at 2125-26 (Jan. 9, 2013) (“EPA does not look at whether the specific standards at issue are needed to meet compelling and extraordinary conditions related to that air pollutant.” ; *see also* EPA’s July 9, 2009 GHG Waiver Decision wherein EPA rejected the suggested interpretation of section 209(b)(1)(B) as requiring a review of the specific need for California’s new motor vehicle greenhouse gas emission standards as opposed to the traditional interpretation (need for the program as a whole) applied to local or regional air pollution problems.

⁶⁴ California Waiver Request Support Document, at 16-17.

⁶⁵ California Waiver Request Support Document, at 17.

⁶⁶ See CARB Resolution 08-44 at 5. These estimates were later reduced somewhat. See footnote 69 hereafter.

⁶⁷ 74 FR 32744, 32762-63 (July 8, 2009).

previously stated, “nothing in [California’s unique geographic and climatic] conditions has changed to warrant a change in this determination.”⁶⁸

California projects reductions in NOx emissions of 3.1 tons per day in 2014 and one ton per day in 2020 due to the HD GHG Regulations.⁶⁹ California states that these emissions reductions will help California in its efforts to attain applicable air quality standards. California further projects that the HD GHG Regulations will reduce GHG emissions in California by approximately 0.7 million metric tons (MMT) of carbon dioxide equivalent emissions (CO₂e) by 2020.⁷⁰

Based on the record before us, EPA is unable to identify any change in circumstances or evidence to suggest that the conditions that Congress identified as giving rise to serious air quality problems in California no longer exist. Therefore, EPA cannot deny the waiver based on EPA’s traditional interpretation under this waiver prong.

EPA received comment suggesting that the Agency’s past actions suggest that there can be no “need” for CARB’s trailer standards. Specifically, in one comment, CCTA argues that the EPA’s “cause or contribution finding,” made at the same time as EPA’s endangerment finding, concludes that current and projected concentrations of six key greenhouse gases in the atmosphere threaten the public health and welfare of current and future generations, but only included a definition of “new motor vehicles and new motor vehicle engines” and did not include new or newer trailers in the finding.⁷¹ While

⁶⁸ 74 FR 32744, 32762 (July 8, 2009); 76 FR 77515, 77518 (December 13, 2011).

⁶⁹ California Waiver Request Support Document, at 1; *see also* CARB Staff Report: Initial Statement of Reasons for Proposed Rulemaking (ISOR), October 2008, at ES5 and 56 (initially projecting even higher CO₂ and NOx emission reductions).

⁷⁰ California Waiver Request Support Document, at 1.

⁷¹ CCTA, at 6. As background, on December 7, 2009 the EPA Administrator made two distinct findings regarding greenhouse gases under section 202(a) of the Clean Air Act. These findings were published at 74 FR 66496 (December 15, 2009). EPA noted that the transportation sources covered under section 202(a)

CCTA phrased its comment as an argument against a necessity determination, these issues are extraneous to EPA's evaluation of the request as dictated by section 209(b)(1)(B).⁷² First, as previously noted, the HD GHG Regulations relate to the control of emissions from new motor vehicles, and trailers are appropriately considered within that term. Therefore, CCTA's claim that EPA's cause or contribution finding excluded trailers is incorrect. Second, the HD GHG Regulations are promulgated under the authority of California state law, and are neither contingent on nor dependent upon EPA's endangerment finding.⁷³ Finally, EPA's evaluation of whether California's standards are necessary to meet compelling and extraordinary conditions is not contingent on or directly related to EPA's cause or contribution finding, which was a completely different determination than whether California needs its mobile source pollution program to meet compelling and extraordinary conditions in California.

CTA, also commenting on protectiveness, argues that California has not quantified how the HD GHG Regulations would "contribute to attainment of ozone or fine particle standards in any meaningful way."⁷⁴ But nothing in section 209(b)(1)(B) calls for California to quantify specifically how its regulations would affect attainment of the national ambient air quality standards in the state. As noted above, California did

(the section under which the two findings occur) include passenger cars, light- and heavy-duty trucks, buses, and motorcycles.

⁷² Although CCTA did not suggest that a supposed lack of an endangerment and/or cause or contribution finding regarding trailers causes CARB's Regulations to be inconsistent with section 202(a) (and thus a waiver should not be granted under the third waiver prong), EPA nevertheless incorporates the reasoning set forth in the 2009 light-duty motor vehicle greenhouse gas emission waiver at 74 FR 32744, 32778-32780 (July 8, 2009).

⁷³ CCTA acknowledges that the California program to reduce emissions from motor vehicles in fact predates the CAA. Here, California's HD GHG tractor-trailer regulations are particularly authorized under the California Global Warming Solutions Act of 2006 (AB 32), codified at California Health and Safety Code section 38560.5. *See* CARB Supplemental Comments, EPA-HQ-OAR-2013-0491-0054, at 2-3.

⁷⁴ CTA, at 2. CTA's argument is perhaps more relevant to the "protectiveness" criterion discussed above, but CTA nevertheless raised the issue under this prong instead, as to whether California's program is necessary to meet compelling and extraordinary conditions.

quantify the projected reductions in emissions.⁷⁵ California further states that these emissions reductions will help California in its efforts to attain national and California air quality standards for particulate matter and ozone. As stated before, the relevant question is whether California needs its own motor vehicle pollution program to meet compelling and extraordinary conditions, and not whether the specific standards that are the subject of this waiver request are necessary to meet such conditions.⁷⁶

In another comment, CCTA argues that since EPA and the National Highway Transportation Safety Administration (NHTSA) have embarked on the Heavy-Duty National Program to regulate GHG emissions from heavy-duty vehicles, California's program is no longer necessary.⁷⁷ However, as EPA has explained in previous decisions, the existence of a parallel or harmonized national program does not mean that California's program is no longer necessary.⁷⁸ Furthermore, EPA's GHG regulations for heavy-duty vehicles apply to 2014 and later tractors. California's HD GHG Regulations, on the other hand, extend further than EPA's regulations to cover 2011 through 2013 tractors and also 2011 and later trailers. The California HD GHG Regulations apply earlier than the Heavy-Duty National Program, reflecting CARB's interest in further action to address California's ongoing air quality conditions. The CCTA presents no

⁷⁵ California Waiver Request Support Document, at 1; *see also* CARB Staff Report: Initial Statement of Reasons for Proposed Rulemaking (ISOR), October 2008, at ES5 and 56 (initially projecting even higher CO₂ and NO_x emission reductions).

⁷⁶ *See* 78 FR 2112, at 2125-26 (Jan. 9, 2013) ("EPA does not look at whether the specific standards at issue are needed to meet compelling and extraordinary conditions related to that air pollutant."); *see also* EPA's July 9, 2009 GHG Waiver Decision wherein EPA rejected the suggested interpretation of section 209(b)(1)(B) as requiring a review of the specific need for California's new motor vehicle greenhouse gas emission standards as opposed to the traditional interpretation (need for the program as a whole) applied to local or regional air pollution problems.

⁷⁷ CCTA, at 6.

⁷⁸ *See, e.g.*, California State Motor Vehicle Pollution Control Standards; Notice of Decision Granting a Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles," 74 FR 32744 (July 8, 2009) (granting waiver despite the fact that EPA and NHTSA had embarked on a parallel national program to reduce GHG emissions from light duty vehicles).

evidence that CARB's emissions regulation program is not necessary to address the "compelling and extraordinary conditions" underlying the state's air pollution problems.

In summary, EPA has not received any adverse comments suggesting that California no longer needs a separate motor vehicle emissions program to address the various conditions that led to serious and unique air pollution problems in California. Based on the record, EPA is unable to identify any change in circumstances or any evidence to suggest that the conditions that California identified as giving rise to serious air quality problems in California no longer exist. Therefore, EPA cannot deny the waiver request here based on this criterion.

D. Consistency with Section 202(a)

For the third and final criterion, EPA evaluates the program for consistency with section 202(a) of the CAA. Under section 209(b)(1)(C) of the CAA, EPA must deny California's waiver request if EPA finds that California's standards and accompanying enforcement procedures are not consistent with section 202(a). Section 202(a) requires that regulations "shall take effect after such period as the Administrator finds necessary to permit the development and application of the relevant technology, considering the cost of compliance within that time."

EPA has previously stated that the determination is limited to whether those opposed to the waiver have met their burden of establishing that California's standards are technologically infeasible, or that California's test procedures impose requirements inconsistent with the federal test procedure. Infeasibility is shown by demonstrating that there is inadequate lead time to permit the development of technology necessary to meet the HD GHG Regulations that are subject to the waiver request, giving appropriate

consideration to the cost of compliance within that time.⁷⁹ California's accompanying enforcement procedures would also be inconsistent with section 202(a) if the federal and California test procedures conflicted, i.e., if manufacturers would be unable to meet both the California and federal test requirements with the same test vehicle.⁸⁰

EPA has reviewed the information submitted to the record to determine whether the parties opposing this waiver request have met their burden to demonstrate that the HD GHG Regulations subject to the waiver request are not consistent with section 202(a). Regarding test procedure conflict, as CARB notes, there is no issue of test procedure inconsistency because there are no analogous federal standards or associated test procedures applicable to new 2011 through 2013 MY sleeper tractors and new 2011 and subsequent MY dry-van and refrigerated-van trailers that are pulled by such tractors.⁸¹ EPA has received no adverse comment or evidence of test procedure inconsistency. Therefore, EPA cannot deny the waiver on the grounds of test procedure inconsistency.

EPA did not receive comments arguing that the HD GHG Regulations were infeasible when reviewed purely as a matter of technology. The Agency did, however, receive comment arguing that the cost of compliance is excessive. In its comment, OOIDA states that the HD GHG Regulations impose large expenses on thousands of small and financially struggling carriers.⁸²

Regarding cost of compliance arguments such as OOIDA's, EPA's previous waiver decisions indicate that cost of compliance as it relates to lead time must be shown

⁷⁹ See, e.g., 38 F.R 30136 (November 1, 1973) and 40 F.R 30311 (July 18, 1975).

⁸⁰ See, e.g., 43 F.R 32182 (July 25, 1978).

⁸¹ California Waiver Request Support Document, at 22. EPA notes that California's trailer requirements are based on EPA's SmartWay program, including requiring implementation of EPA SmartWay verified technologies (or their equivalents). However, as mentioned above, EPA's SmartWay Program is a voluntary system, and does not involve any federal standards or test procedures that could be considered inconsistent with California's HD GHG Regulations.

⁸² OOIDA, at 3-4.

to be excessive in order to find that California's standards are inconsistent with section 202(a).⁸³ In *MEMA I*, the court addressed the cost of compliance issue in reviewing a waiver decision. According to the court:

Section 202's cost of compliance concern, juxtaposed as it is with the requirement that the Administrator provide the requisite lead time to allow technological developments, refers to the economic costs of motor vehicle emission standards and accompanying enforcement procedures. *See* S. Rep. No. 192, 89th Cong., 1st Sess. 5–8 (1965); H.R. Rep. No. 728 90th Cong., 1st Sess. 23 (1967), *reprinted in* U.S. Code Cong. & Admin. News 1967, p. 1938. It relates to the timing of a particular emission control regulation rather than to its social implications. Congress wanted to avoid undue economic disruption in the automotive manufacturing industry and also sought to avoid *doubling or tripling* the cost of motor vehicles to purchasers. It, therefore, requires that the emission control regulations be technologically feasible within economic parameters. Therein lies the intent of the cost of compliance requirement (emphasis added).

OIDA does not submit sufficient evidence to meet the opponents' burden of proof to show that the costs of compliance with the HD GHG Regulations are so excessive as to constitute technological infeasibility. For tractors, CARB estimated the average incremental capital cost of compliance in 2008 to be \$2,100 per tractor, which could be recovered within 1.0 to 1.5 years through fuel savings.⁸⁴ OOIDA does not submit any evidence contrary to these estimates for tractors, and no evidence in the record refutes these estimates. Therefore, EPA cannot find that the costs of compliance have been shown to be excessive for tractors.

For trailers, OOIDA disagrees with CARB's estimate of total average cost of compliance. CARB calculated the average incremental cost of trailer compliance as

⁸³ *See, e.g.*, 78 FR 2134 (Jan. 9, 2013), 47 FR 7306, 7309 (Feb. 18, 1982), 43 FR 25735 (Jun. 17, 1978), and 46 FR 26371, 26373 (May 12, 1981).

⁸⁴ California Waiver Request Support Document, June 20, 2013, EPA-HQ-OAR-2013-0491-0003, at 21.

\$2,900 per trailer, plus an additional \$125 annually for maintenance and reporting costs.⁸⁵

CARB estimated that the additional cost could be recovered within 18 months through reduced fuel consumption (or, alternatively, through commanding higher rates from freight carriers due to the improved fuel efficiency provided by the aerodynamic trailers).⁸⁶ CARB's cost estimate has since decreased to an estimated \$1,250 per trailer, which is expected to be recovered in 11 months, on average, through fuel savings.⁸⁷

OOIDA, on the other hand, portrays the cost as \$7,520-\$9,325 per trailer,⁸⁸ and says that CARB's projected payback is greatly overstated.⁸⁹

OOIDA does not provide evidence or data to support its higher cost estimates for trailers. Instead, OOIDA relies upon an incorrect portrayal of CARB's original estimates. OOIDA misstates CARB's cost estimates in two ways. First, OOIDA's estimate incorrectly assumes that a company must install all available types of trailer aerodynamic devices (i.e., front, side, and rear fairings) simultaneously to achieve compliance.⁹⁰ However, this assumption overestimates likely costs since the CARB-mandated levels of performance can be attained with single devices or with paired combinations (e.g., front with side fairing, rear with side fairing, or front and large rear fairing).⁹¹ Second, OOIDA

⁸⁵ California Waiver Request Support Document, June 20, 2013, EPA-HQ-OAR-2013-0491-0003, at 24-25; *see also* CARB Staff Report: Initial Statement of Reasons for Proposed Rulemaking (ISOR), October 2008, at 33-42, 60-62.

⁸⁶ California Waiver Request Support Document, at 25; ISOR, at 42.

⁸⁷ ATA, at 5 (citing CARB estimates that were updated in 2012).

⁸⁸ OOIDA, at 4.

⁸⁹ OOIDA, at 5, 10, 14.

⁹⁰ *Compare* OOIDA, at 4, and California Waiver Request Support Document, June 20, 2013, EPA-HQ-OAR-2013-0491-0003, at 24-25; *see also* ISOR, at 20, 60, and CARB's Supplemental Comment, at 14.

⁹¹ 17 C.C.R. § 95303(b) (requiring 2011 and newer trailers to be either (i) a U.S. EPA Certified SmartWay Trailer or (ii) equipped with verified SmartWay tires plus any combination or aerodynamic technologies demonstrated to provide a specified level of fuel savings (4% for refrigerated trailers, and 5% for dry van trailers)). Specifications for EPA Certified SmartWay Trailer configurations generally have a gap reducer on the trailer front or tail, but not both. *See* U.S. EPA Designated SmartWay Mark: License Agreement, Technical Specification & Requirements, and Graphics Standards & Usage Guide for Tractor & Trailer

incorrectly counts a \$2,800 incremental cost for a “SmartWay certified trailer” as a separate and additional cost above the cost of the aerodynamic technologies used, when instead the cost is duplicative (i.e., the incremental cost for a SmartWay certified trailer includes the cost of the aerodynamic technologies).⁹² Adjusted for these differences, OOIDA’s cost figures are in relative agreement with CARB’s original cost projections (which CARB now estimates are even lower). Therefore, there is no evidence showing CARB’s estimated cost of compliance for trailers to be excessive or infeasible.⁹³

OOIDA also submits various arguments about cost-effectiveness of the HD GHG Regulations, asserting that the costs of the HD GHG Regulations outweigh the emission benefits that CARB seeks to attain.⁹⁴ OOIDA argues that the HD GHG Regulations are especially not cost-effective for trailers, which OOIDA estimates are on the road only one-third as often as tractors, and for motor carriers who only occasionally make trips into California.⁹⁵ OOIDA also notes that compliance with the HD GHG Regulations will have negative side effects. For example, OOIDA states that the required low-rolling-resistance (LRR) tires will have a shorter life span and be less safe than regular tires, causing increased traffic backups or use of tire chains (and thus increased fuel usage) in inclement weather. OOIDA also argues that the HD GHG Regulations will cause reduced freight capacity and revenue due to the added weight of the required aerodynamic equipment.⁹⁶ OOIDA does not provide any supporting evidence to verify or quantify these potential additional costs. Finally, OOIDA and other commenters suggest

Manufacturers,” at 7 (publication available at <http://www.epa.gov/smartway/documents/technology/get-designated/420-B11-013.pdf>).

⁹² Compare OOIDA, at 4, and ISOR, at 33-42, 60-62; see also CARB’s Supplemental Comment, at 14.

⁹³ California Waiver Request Support Document, at 24-25; ISOR, at 33-42, 60-62.

⁹⁴ OOIDA, at 4.

⁹⁵ OOIDA, at 5, 14.

⁹⁶ OOIDA, at 9-10.

that many tractors do not obtain the expected fuel savings due to application-specific factors such as typical speeds and miles travelled.⁹⁷ However, they have not provided any evidence supporting a significantly different average cost or payback time.

CARB disputes OOIDA's assertions about shorter life spans or difficulties in inclement weather with LRR tires, stating that there is no evidence to support OOIDA's claims.⁹⁸ CARB additionally states that reduced freight capacity due to weight of the aerodynamic equipment would be relatively insignificant for a heavy duty vehicle, with the average weight of a set of side skirts being between 150 and 350 lbs.⁹⁹

In the context of a section 209(b) waiver review, EPA generally does not consider arguments that a regulation will result in only marginal air quality improvements, or that the expected air quality benefits will be outweighed by the costs, to be legally pertinent in evaluating cost-of-compliance.¹⁰⁰ EPA has stated that "[t]he appropriate level of cost-effectiveness is a policy decision of California," and EPA has historically deferred to California on these policy decisions.¹⁰¹ In addition, the costs of compliance with the HD Regulations are expected to be quickly recovered through fuel savings, as stated above.

In summary, the evidence that has been presented is insufficient to show that the HD GHG Regulations are technologically infeasible, considering costs of compliance. Indeed, such a finding is particularly unlikely where the average lifetime fuel savings created by compliance with the trailer regulations are expected to exceed the projected cost of compliance. In addition, no evidence has been presented showing that California's test procedures impose requirements inconsistent with federal test procedures. Therefore,

⁹⁷ Id.

⁹⁸ CARB's Supplemental Comment, at 15-16.

⁹⁹ CARB's Supplemental Comment, at 16.

¹⁰⁰ See 78 FR 2134 (Jan. 9, 2013).

¹⁰¹ Id.

the waiver opponents have presented no evidence demonstrating that the HD GHG Regulations are not consistent with Section 202(a).

E. Other Issues Raised Outside of the Scope of this Review

a. Constitutional Issues

Some of the commenters, including the CCTA and OOIDA, argue that the HD GHG Regulations violate the commerce clause of the U.S. Constitution in that the HD GHG Regulations will have the effect of disproportionately and unfairly burdening out-of-state carriers.¹⁰² For example, CCTA argues that exemptions in the HD GHG Regulations for local-haul, drayage, and short-haul tractors and trailers will result in the exemption of most California in-state motor carriers, but virtually no out-of-state motor carriers. The comments further point out that the uneven impact does not correlate closely, if at all, with expected GHG emissions from the respective vehicles.¹⁰³ OOIDA argues that the HD GHG Regulations unfairly burden out-of-state carriers who contribute less in emissions than exempted in-state motor carriers.¹⁰⁴

However, commerce clause issues are beyond the scope of this review. As stated in *MEMA I*, “[t]he waiver proceeding produces a forum ill-suited to the resolution of constitutional claims.”¹⁰⁵ Constitutional challenges to the HD GHG Regulations are more appropriately addressed by a legal challenge directly against the state. Moreover, EPA has consistently refrained from reviewing California’s requests for waivers based on

¹⁰² CCTA, at 3-5; OOIDA, at 3, 10-17.

¹⁰³ CCTA, at 4-5; OOIDA, at 6-8. A disproportionate impact on out-of-state carriers is supported by CARB’s data as well. *See, e.g.*, ISOR, at 12-15 (projecting only 37,009 impacted MY 2010 tractors and 92,523 impacted MY 2010 trailers in California, versus 398,677 impacted MY 2010 tractors and 996,693 impacted MY 2010 trailers outside of California. Thus, over 90% of the cost impact of California’s Regulations is expected to occur outside of California.).

¹⁰⁴ OOIDA, at 3, 8.

¹⁰⁵ *MEMA I*, *supra*, 627 F.2d at 1114-1120; *See also Motor & Equipment Mfrs Ass’n v. Nichols*, 142 F.3d 449, 462-463, 466-467 (D.C. Cir. 1998).

criteria that extend beyond those set forth in section 209(b) of the CAA,¹⁰⁶ and courts have confirmed that EPA could not deny a waiver based on such additional criteria. “If EPA concludes that California’s standards [meet section 209(b)], it is obligated to approve California’s waiver application.”¹⁰⁷ Therefore, EPA cannot find this issue to be a proper ground for denial of California’s waiver request.

b. Conflict with the Federal Aviation Administration Authorization Act

CCTA and OOIDA also argue that the HD GHG Regulations violate the Federal Aviation Administration Authorization Act (FAAAA)¹⁰⁸ on grounds that the requirements directly affect the prices, routes, and services of motor carriers.¹⁰⁹ However, as discussed above, the criteria EPA must apply in deciding whether to grant or deny a waiver are specifically prescribed in section 209(b). Conflict with the FAAAA is not one of those criteria. Thus, questions about whether California’s HD GHG Regulations comply with the FAAAA are outside of the proper scope of review under section 209(b) and EPA cannot deny a waiver request under section 209(b) based on this issue. Therefore, EPA cannot find this issue to be a proper ground for denial of California’s waiver request.

c. Whether the HD GHG Regulations Improperly Regulate Fuel Economy

CCTA argues that the California HD GHG Regulations impermissibly regulate fuel economy, and that the authority to regulate fuel economy resides solely with the National Highway Traffic Safety Administration (NHTSA).¹¹⁰ Again, however, as with

¹⁰⁶ See 78 FR 2112, 2145 (January 9, 2013) and 74 FR 3030 (January 16, 2009).

¹⁰⁷ *Motor & Equipment Mfrs Ass’n v. Nichols*, 142 F.3d 449 at 463.

¹⁰⁸ CCTA, at 3; OOIDA, at 17.

¹⁰⁹ CCTA, at 3.

¹¹⁰ CCTA, at 2-3. Presumably, CTA is arguing that the Energy Policy and Conservation Act (EPCA) preempts the California HD GHG Regulations to the extent that they regulate fuel economy.

the commerce clause and FAAAA issues, the Agency has previously determined that this issue is outside of the proper scope of review since it is not among the criteria listed under section 209(b).¹¹¹ As a result, EPA cannot deny a waiver request based on whether California's HD GHG Regulations regulate fuel economy. Therefore, EPA cannot find this issue to be a proper ground for denial of California's waiver request.

d. *Effects of Delay and Previous Non-Enforcement of the Regulations*

Some commenters, including the ATA and CTA, criticize California for not enforcing the HD GHG Regulations for nearly four years after implementation. They argue that the non-enforcement has increased carrier costs and has disadvantaged carriers who attempted to comply with the HD GHG Regulations on time.¹¹² ATA further asks EPA to consider in its waiver decisions whether California has adequate enforcement resources to actually achieve the projected levels of compliance and emissions benefits that CARB projects when it makes its waiver requests.¹¹³ California responds that CTA's and ATA's assertions on enforcement issues are not issues properly considered in this decision.¹¹⁴

As discussed above, EPA may only deny waiver requests that are based on criteria listed under section 209(b), and both delayed enforcement and previous non-enforcement of prior regulations are not among them. Thus, these issues are outside of the proper scope of review because they are not among the criteria listed under section 209(b).

¹¹¹ 74 FR 32744, 32782-83 (July 8, 2009) ("As EPA has stated on numerous occasions, section 209(b) of the Clean Air Act limits our authority to deny California's requests for waivers to the three criteria therein, and EPA has refrained from denying California's request for waivers based on any other criteria.").

¹¹² ATA, at 6; CTA, at 2.

¹¹³ ATA, at 6.

¹¹⁴ CARB's Supplemental Comment, at 20.

Therefore, EPA cannot find these issues to be a proper ground for denial of California's waiver request.

e. *Applicability of the Regulations to Already-Purchased Equipment*

Finally, ATA expresses concern about delays in the submission and approval of California waivers and authorizations, and ATA asks EPA to determine whether it is "valid" for the HD GHG Regulations to apply to equipment that has already been purchased and is in operation."¹¹⁵ However, ATA does not show how this concern is relevant to the criteria that EPA must evaluate related to California's request for a waiver under section 209(b).

As previously explained, EPA may only deny waiver requests that are based on criteria listed under section 209(b), and EPA has consistently refrained from reviewing California's requests for waivers and authorizations based on criteria that extend beyond the criteria of section 209(b) of the CAA. Therefore, EPA cannot find this issue to be a proper ground for denial of California's waiver request.

IV. Decision

The Administrator has delegated the authority to grant California section 209(b) waivers to the Assistant Administrator for Air and Radiation. After evaluating CARB's amendments to the HD GHG Regulations described above and CARB's submissions for EPA review, EPA is hereby granting a waiver for California's Tractor-Trailer Greenhouse Gas Regulations ("HD GHG Regulations") for new 2011 through 2013 MY Class 8 tractors equipped with integrated sleeper berths (sleeper-cab tractors) and to new 2011 and subsequent MY dry-van and refrigerated-van trailers that are pulled by such tractors on California highways.

¹¹⁵ ATA, at 6.

This decision will affect not only persons in California, but also manufacturers and operators nationwide who must comply with California's requirements. In addition, because other states may adopt California's standards for which a section 209(b) waiver has been granted under section 177 of the Act if certain criteria are met, this decision would also affect those states and those persons in such states. For these reasons, EPA determines and finds that this is a final action of national applicability, and also a final action of nationwide scope or effect for purposes of section 307(b)(1) of the Act.

Pursuant to section 307(b)(1) of the Act, judicial review of this final action may be sought only in the United States Court of Appeals for the District of Columbia Circuit. Petitions for review must be filed by **[INSERT DATE SIXTY DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. Judicial review of this final action may not be obtained in subsequent enforcement proceedings, pursuant to section 307(b)(2) of the Act.

V. Statutory and Executive Order Reviews

As with past waiver and authorization decisions, this action is not a rule as defined by Executive Order 12866. Therefore, it is exempt from review by the Office of Management and Budget as required for rules and regulations by Executive Order 12866.

In addition, this action is not a rule as defined in the Regulatory Flexibility Act, 5 U.S.C. § 601(2). Therefore, EPA has not prepared a supporting regulatory flexibility analysis addressing the impact of this action on small business entities.

Further, the Congressional Review Act, 5 U.S.C. § 801, *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, does not apply because this action is not a rule for purposes of 5 U.S.C. § 804(3).

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